IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MISSOURI

IN RE:	)	
	)	
MARCUS LEVI PARKER,	)	Case No. 02-20377
	)	
Debtor,	)	
	)	
TINA MARIE PARKER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. No. 02-2024
	)	
MARCUS LEVI PARKER,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter is before the Court on the complaint filed by Tina Marie Parker ("Plaintiff") against her former spouse, Marcus Levi Parker ("Debtor"), requesting that the Court declare certain debts to be nondischargeable under either 11 U.S.C. §§ 523(a)(5) or 523(a)(15). The Plaintiff also requests that the Court issue orders under 11 U.S.C. § 105 denying Debtor's discharge, finding him to be in contempt and imposing appropriate sanctions against him, including Plaintiff's reasonable attorney's fees. Following a trial on August 21, 2002, the Court took the matter under advisement. The Court now rules as follows.

Factual Background

On February 27, 2002, Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. Thereafter, Plaintiff filed this adversary complaint. The debts that Plaintiff seeks to have declared nondischargeable arise out of a Judgment and Decree of Dissolution of Marriage (the "Decree") entered by the Circuit Court of Cole County, Missouri on December 29, 2000. The Decree

provided that Plaintiff would have sole legal and physical custody of the parties' unemancipated minor daughter, born November 3, 1984, subject to Debtor's reasonable daytime visitation. In the section of the Decree labeled Child Support, the state court ordered Debtor to pay Plaintiff child support in the amount of $175.00 per month commencing November 1, 2000. In addition to paying regular child support, the state court ordered Debtor to pay an additional $50.00 per month commencing November 1, 2000, to be applied towards his $1,068.00 child support arrearage, plus interest, based upon a temporary child support order dated July 17, 2000, which was made retroactive to April 1, 2000. Once the child support arrearage was paid in full, Debtor's child support payment would revert to $175.00 per month. The Child Support section of the Decree further provided in relevant part that:

> (g) [Plaintiff] shall maintain health, dental and vision insurance on the child through her employment, or if no such insurance is available through her employment, then through a private insurance company. [Plaintiff] shall pay 50% and [Debtor] shall pay 50% of the cost, expense or charges for all medical, dental, orthodontic, endodontic, prescription, optical, psychiatric, psychological, nursing, counseling and other health care expenses incurred by or on behalf of the child to the extend [sic] that such "medical costs" are actually incurred and are not fully covered or not fully paid or reimbursed by Medicare or a health benefit plan. . . . If a parent incurs attorney fees or expenses because the other parent failed to timely comply with the provisions herein regarding health care coverage, the defaulting party shall be required to pay the other parent's attorney fees and costs in enforcing this provision and all interest accrued on the unpaid health expense.[1]

In the section of the Decree labeled Property and Debts, the state court awarded personal property to Plaintiff having a total fair market value in the amount of $35,758.73. The personal property set over to Plaintiff included a 1992 Clayton mobile home valued at $12,000.00 with a lien against it in the amount of $3,500.00, and a Maytag Corporation Salary Savings and Employee Stock

[1] In her complaint Plaintiff asserted that Debtor has refused to pay his 50% share of more than $1,000.00 of such medical expenses incurred by Plaintiff on behalf of the minor child since December 29, 2000. During trial, Plaintiff admitted that she has never shown Debtor the bills for these medical expenses and has never asked for his 50% contribution because she did not think it would do any good to do so.

Ownership Plan valued at $13,458.73. The state court awarded the following personal property to Debtor having a total fair market value in the amount of $20,700.00:

1985 Ford Ranger pickup truck	$ 500.00
1985 Dodge pickup truck (white)	5,000.00
1985 Dodge Caravan	500.00
1977 Harley Davidson 1000 cc Sportster motorcycle	4,700.00
Baseball Card and Memorabilia collection	3,000.00
All American Water Proofing (the Debtor's side business)	0
Miscellaneous household goods and personal effects	500.00
Miscellaneous hand and power tools	1,000.00
Music equipment	2,000.00[2]
Stock portfolio	3,000.00
Computer and accessories	500.00
Total	$20,700.00

In the Property and Debts section of the Decree the state court also ordered Plaintiff to pay marital indebtedness in the total amount of $26,077.00, including the $3,500.00 lien on the 1992 Clayton mobile home and an $11,727.00 debt owed to the Internal Revenue Service, and hold Debtor harmless from any liability thereon. The state court ordered Debtor to pay the following marital debts and hold Plaintiff harmless from any liability thereon:

Bank One	$ 4,700.00
American General Finance	5,800.00
One-half of the $5,500.00 debt to Cambridge Credit Company	2,750.00
Capitol One Visa	200.00
Total	$12,450.00

The state court ordered Debtor to pay his half of the Cambridge Credit Company debt by paying one-half of the regular monthly payment for this debt directly to Plaintiff by the first day of each month commencing November 1, 2000. Plaintiff was ordered to pay one-half of this debt and to remit to Cambridge Credit Company her portion each month when due plus all amounts received from

[2] The music equipment included a Tama drum set, several amplifiers, monitors, speakers and guitars.

Debtor towards payment of this debt.

The Decree further provided that neither party would receive maintenance from the other, and that each party would be responsible for his or her own attorney's fees.

Although at the time of the divorce Plaintiff was employed by Maytag Inc. earning a monthly gross income of approximately $2,668.00, Plaintiff is now employed by the Missouri State Highway Patrol as a Receptionist/Clerk I Typist earning a gross salary of $1,754.20 per month. Plaintiff also works part-time for Roedel Cleaning Service earning a gross income of $273.00 per month. Plaintiff's net monthly income is now approximately $1,514.10.

Plaintiff testified that she does not keep the child support paid by Debtor, but instead gives it directly to the parties' seventeen-year-old daughter. The minor daughter will be eighteen years old on November 3, 2002. She quit high school near the end of the 2002 school year, but has obtained her General Equivalency Diploma and is considering enrolling in a cosmetology school. Plaintiff testified that the minor daughter still depends on her for support.

Plaintiff first testified that she paid the Cambridge Credit Company debt in full when she sold the 1992 Clayton mobile home that she was awarded in the divorce. Plaintiff then testified that she obtained a consolidation loan from Jefferson City Highway Credit Union to pay off this debt and her car loan. Plaintiff testified that the Cambridge Credit Company debt was a combination of debts, including a debt to Dillard's incurred for expenses for the parties' minor daughter for school, clothes and other miscellaneous items; a debt to J.C. Penney for similar type expenses incurred for the parties' minor daughter; a debt to St. Mary's Hospital for medical expenses incurred for the parties' minor daughter; and a debt to Beneficial Finance for an expense incurred by Plaintiff, which she said was less than the amount of $2,750.00. Plaintiff asserted that half of the Cambridge Credit Company debt was a support debt for the parties' minor daughter because the "debts were incurred for Sarah's

expenses for her well being."

Plaintiff has also paid almost $9,000.00 on the $11,727.00 debt owed to the Internal Revenue Service. Plaintiff has made voluntary payments, and the IRS has intercepted income tax refunds due her. Plaintiff is attempting to reach a settlement with the IRS on the remaining amount owed on this debt. Plaintiff also asserted that she has paid the $200.00 debt to Capitol One Visa, which Debtor had been ordered to pay in the Decree, and stated that this obligation had been incurred so that the parties' minor daughter could do her homework on the Internet.

According to Plaintiff's exhibit and testimony, her current monthly payments are:

Rent		$ 495.00
Car payment		340.00
Car insurance		100.55
Utilities		69.00
Phone		50.00
Fuel		120.00
Food		100.00
Central Trust Bank (tax loan)	94.80	
Miscellaneous	28.00	
	Total	$1,397.35

Plaintiff testified that the car payment in the amount of $340.00 per month is deducted from the paycheck she receives from the Missouri State Highway Patrol. It appears that the monthly expense designated as the car payment is the amount paid on the consolidation loan that Plaintiff obtained from the Jefferson City Highway Credit Union. Currently, Plaintiff's income exceeds her expenses by $116.75 each month, and she will have additional disposable income each month after resolving her tax situation with the IRS. However, Plaintiff stated that the monthly expenses she listed do not include the expenses that she incurs for the parties' minor daughter, expenses incurred for clothes for herself, beauty shop expenses or birthday and Christmas gifts purchased for her five grandchildren. Plaintiff further testified that she goes to food banks to help with her food expense.

Debtor was not working at the time of the divorce, except for sporadic performance as a musician. When he filed his Chapter 7 bankruptcy petition, Debtor indicated in his schedules that he had been employed by NuWay Rental for over 7 months.[3] Debtor was still employed by NuWay Rental at the time of trial. Debtor makes $10.00 per hour and works 40 hours per week, which results in a monthly gross wage in the amount of $1,733.33, exclusive of overtime pay.[4] According to the Debtor's Schedule I, his net monthly income is $1,321.01. Debtor also testified that he plays in a band performing on average two gigs per month earning about $50.00 per gig gross and about $30.00 per gig net. In addition, Debtor stated that he also earns a net amount of $200.00 to $250.00 per month from his part-time waterproofing business, All American Water Proofing. Based on Debtor's Schedule I and his testimony, his net income per month is $1,581.01 to $1,631.01. According to Debtor's Schedule J, his monthly expenses are:

Rent		$ 350.00
Telephone		60.00
Food		200.00
Clothing		25.00
Laundry and dry cleaning		40.00
Medical and dental expenses		75.00
Transportation		86.00
Recreation, clubs and entertainment, etc.		60.00
Automobile insurance	60.00	
Personal property taxes		20.00

[3] On September 11, 2002, subsequent to trial, Debtor filed amended schedules B, C, D, E, F, I and J and statement of financial affairs after his case had been reopened for the purpose of permitting the filing of a reaffirmation agreement between Debtor and American General Finance. Because this paperwork was filed after the parties had submitted all of their evidence and the trial had been concluded, the Court will ignore the amended schedules and statement of financial affairs for purposes of ruling on whether the debts in question are nondischargeable under sections 523(a)(5) and (a)(15).

[4] Calculated as follows: $10.00 per hour x 40 hours per week = $400.00 per week x 52 weeks = $20,800.00 per year divided by 12 months = $1,733.33 gross income per month. According to Debtor's Schedule I, he works a negligible amount of overtime each month, earning the gross amount of only $6.37.

Automobile installment payment		286.00
Reaffirmed Visa card payment		40.00
Storage shed rental for tools		100.00
Alimony, maintenance and support		261.00
Cigarettes		112.58
	Total	$1,775.58

Although the child support arrearage totals approximately $2,900.00 in principal and interest, Debtor has been making payments in the form of wage withholding in the amount of approximately $50.00 per week since February of 2002. Debtor asserted that he is not attempting to discharge in bankruptcy the child support owed to Plaintiff.

Based on Debtor's schedules and testimony, his expenses exceed his net income by $144.57 to $194.57 each month. However, Debtor stated that he is the father of a child who was born after the bankruptcy filing, and that he is helping with the child care expenses. Debtor estimated that these expenses are between $200.00 and $300.00 per month. Debtor's monthly shortfall is approximately $344.57 to $494.57.

Debtor does not own any real property, and his Schedule B shows that he owns personal property in the total amount of $11,933.00 consisting of:

Cash on hand	$	50.00
Ameritrade account		433.00
Checking account		50.00
Household goods and furnishings		800.00
Baseball card collection		250.00
Clothing		200.00
Jewelry		100.00
Prudential whole life insurance policy		2,350.00
1968 Chevrolet truck-junker		0
1985 Dodge van-junker		0
1994 Dodge Caravan-used in business		2,800.00
1985 Dodge truck-used in business		2,000.00
Miscellaneous tools for part-time business		300.00
Veteran's Education Benefits account		2,600.00
	Total	$11,933.00

Debtor purchased the 1994 Dodge Caravan in December of 2001. In his Schedule D and in his Statement of Financial Affairs, Debtor indicated that he had obtained a loan from his father, Gene B. Parker, in the amount of $2,200.00 to pay bills in November of 2001, and that on or about February 14, 2002, shortly before filing for bankruptcy, he gave his father a first lien on the 1994 Dodge Caravan as security for this loan. Debtor testified that he gave his father the lien on this vehicle after receiving a collection letter from Plaintiff's counsel and after his stock account and bank account were seized for unpaid child support. Debtor stated that he was concerned that the van, which he needs for transportation to and from work, would be seized because of the past due child support owed to Plaintiff.

Debtor testified and produced documentary evidence that he had sold the 1977 Harley Davidson motorcycle to an unrelated third party in April of 2001 for $2,500.00. Debtor stated that he also no longer has the 1985 Ford Ranger pickup truck, explaining that it quit running and "went the way of the yard." In response to a request made by the Chapter 7 Trustee at the section 341 meeting, Debtor made a list of all of his baseball cards and other baseball memorabilia for the Trustee. Debtor used a valuation guide or a website on the Internet to place a value on each of the baseball cards and items of memorabilia, and calculated that the collection had a total value in the amount of $230.73. Debtor testified that subsequent to the divorce, he had sold much of his collection to pay bills or had traded baseball cards in exchange for mechanic work. Debtor testified that he had pawned most of his music equipment after the divorce in order to pay attorney's fees. Debtor explained that the value of the music equipment still in his possession was $350.00 to $400.00. Debtor stated that his stock portfolio consisted of investments in Internet stocks, the value of which plummeted after the divorce. Debtor testified that the computer awarded to him in the divorce is obsolete. Finally, Debtor stated that the tools he uses in his waterproofing business are currently worth about $250.00 in their present

condition.

Debtor explained that the debt to Bank One was incurred when a sewer in a home that was being sold needed replaced, and testified that he has not paid anything on the Bank One debt since the divorce. Debtor also conceded that he has not paid anything on the Cambridge Credit Company debt. Debtor did not dispute Plaintiff's testimony that half of this debt resulted from expenses incurred on behalf of the parties' minor daughter. Debtor stated that he has been making payments on the debt to American General Finance, and that he intends to reaffirm this debt. Prior to trial, American General Finance filed a motion to reopen the bankruptcy case for the purpose of filing a reaffirmation agreement entered into prior to the entry of the discharge order. It appears that the security for the debt to American General Finance consists of the 1985 Dodge van; the 1985 Dodge truck, which is used in Debtor's waterproofing business, and a 1984 Mazda B2200 pickup, which, if this is property of Debtor, was not disclosed in his schedules. On August 23, 2002, the Court entered an order reopening Debtor's bankruptcy case, and directed that the reaffirmation agreement between Debtor and American General Finance be filed within 30 days. Debtor also stated that he was going to reaffirm the debt owed to Capitol One Visa,[5] and his Schedule J reflects a monthly payment in the amount of $40.00 for a reaffirmed Visa card debt, but to date no such reaffirmation agreement has been filed. In any event, it appears that Debtor intends to repay this debt. Debtor stated that Plaintiff was mistaken when she testified that she had paid the debt to Capitol One Visa, and that Plaintiff had probably paid a debt on a credit card that she had obtained after the divorce.

Following trial, the Court took the matter under advisement and granted the parties a

[5] Debtor's Schedule F lists a debt owed to Capital One Services in the amount of $277.31 for credit card purchases made in 2000 to 2001. However, in his Statement of Intention, Debtor indicated that he was reaffirming a debt to Providian National Bank, who Debtor listed as a general unsecured creditor for credit card purchases made in 2000.

concurrent 15-day period of time in which to file briefs, if they chose to do so. Neither side filed a post-trial brief. The Court has conducted its own independent research, reviewed the trial transcript and documentary evidence admitted at trial, given careful consideration to this matter and is ready to rule.

Discussion

1. Nondischargeability under 11 U.S.C. §§ 523(a)(5) and 523(a)(15)

In counts one and two of her complaint, Plaintiff seeks a ruling that Debtor's obligation to pay child support; pay one-half of the uninsured medical expenses incurred by or on behalf of the parties' unemancipated minor daughter; pay the marital indebtedness to Bank One, American General Finance and Capitol One Visa; and pay one-half of the Cambridge Credit Company marital debt are nondischargeable under either section 523(a)(5) or section 523(a)(15) of the Bankruptcy Code. "The party objecting to the discharge [of a debt] under § 523(a) has the burden of proving each element by a preponderance of the evidence." Waltner v. Waltner (In re Waltner), 271 B.R. 170, 174 (Bankr. W.D. Mo. 2001)(citing Grogan v. Garner, 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991)). The Court first will address whether each debt is nondischargeable under section 523(a)(5), then, if necessary, will examine the remaining obligations under section 523(a)(15).

a. Section 523(a)(5)

Section 523(a)(5) states that:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt–
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> . . . .
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> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that–
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> (A) such debt is assigned to another entity, voluntarily, by operation of law, or

> otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or
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> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

11 U.S.C. § 523(a)(5).

In Moeder v. Moeder (In re Moeder), 220 B.R. 52, 54 (B.A.P. 8th Cir. 1998), the Eighth Circuit Bankruptcy Appellate Panel opined that "under § 523(a)(5), a debt that is 'actually in the nature of alimony, maintenance or support of a spouse, former spouse, or child of the debtor' is nondischargeable in bankruptcy." The BAP continued:

> As we have previously stated, the question of whether a particular debt constitutes "alimony, maintenance or support" or rather constitutes a property settlement is a question of federal bankruptcy law, not of state law. Tatge v. Tatge (In re Tatge), 212 B.R. 604, 608 (8th Cir. BAP 1997)(citing Williams v. Williams (In re Williams), 703 F.2d 1055, 1056 (8th Cir. 1983)(quoting H.R. REP. NO. 95-595, 95th Cong. 2nd Sess. at p. 364, 1978 U.S. Code Cong. & Ad. News at p. 6319 (1977))). The crucial issue in making this determination is the intent of the parties and the function the award was intended to serve at the time of the divorce. Holliday v. Kline (In re Kline), 65 F.3d 749, 751 (8th Cir. 1995); Adams v. Zentz, 963 F.2d 197, 200 (8th Cir. 1992); Williams, 703 F.2d at 1056; Boyle v. Donovan, 724 F.2d 681, 683 (8th Cir. 1984). Factors to be considered by the courts in determining whether an award arising out of marital dissolution proceedings was intended to serve as an award for alimony, maintenance or support, or whether it was intended to serve as a property settlement include, but are not limited to: the relative financial conditions of the parties at the time of the divorce; the respective employment histories and prospects for financial support; the fact that one party or another receives the marital property; the periodic nature of the payments; and whether it would be difficult for the former spouse and children to subsist without the payments. Tatge, 212 B.R. at 608; Kubik v. Kubik (In re Kubik), 215 B.R. 595, 599 (Bankr. D.N.D. 1997). The bankruptcy court's determination of this issue constitutes a finding of fact that may be reversed only if it is clearly erroneous under the evidence presented. First Nat'l Bank v. Pontow, 111 F.3d 604, 609 (8th Cir. 1997); Kline, 65 F.3d at 750; Adams, 963 F.2d at 200; Williams, 703 F.2d at 1056.

Moeder, 220 B.R. at 55.

Debtor concedes that the child support he was ordered to pay, including the amount owed for the arrearage, is nondischargeable under section 523(a)(5). Indeed, Debtor's bankruptcy petition

reflects the recognition that such debt is nondischargeable, and that Debtor was not seeking to discharge same. Accordingly, the child support obligation is nondischargeable under section 523(a)(5).

The Court determines that Debtor's obligation to reimburse Plaintiff for 50% of the uninsured medical expenses incurred by or on behalf of the minor child is in the nature of support and, therefore, is also nondischargeable under section 523(a)(5). This obligation was established in the Child Support section of the Decree, and the Court believes it reflects the state court's intent that both parties provide for proper medical care of the parties' minor daughter by ordering each to be responsible for one-half of the uninsured medical expenses. The Decree also provides that the defaulting parent shall be required to pay the other parent's attorney's fees and costs incurred in enforcing the obligation to pay 50% of the minor daughter's uninsured medical expenses. The Court determines that an award of attorney's fees and costs to Plaintiff pursuant to this section of the Decree is likewise nondischargeable under section 523(a)(5) because the attorney's fees and costs would be incurred to enforce a support obligation. This Court will defer to the state court for a determination of the amount of uninsured medical expenses that Debtor owes Plaintiff and the amount Debtor is liable to Plaintiff for the attorney's fees and costs she has incurred in pursuing Debtor for payment of this obligation.

The four marital debts that the state court ordered Debtor to pay and hold Plaintiff harmless may also be in the nature of support. See Williams v. Williams (In re Williams), 703 F.2d 1055, 1057 (8th Cir. 1983). "'[P]rovisions to pay expenditures for the necessities and ordinary staples of everyday life' may reflect a support function." Id. (quoting In re Jensen, 17 B.R. 537, 540 (Bankr. W.D. Mo. 1982)). However, the four debts at issue are located in the Property and Debts section of the Decree, which indicates to the Court that the state court was concerned with an appropriate division of the parties' assets and liabilities, and not support. At the time of the divorce, Plaintiff was

gainfully employed earning a monthly gross income of approximately $2,668.00, while Debtor was unemployed except for sporadic performances as a musician. The state court did determine that Debtor was "fully capable of making more than minimum wage of $910.00 per month," but did not elaborate. The state court expressly ordered that neither party would receive maintenance from the other. The state court awarded Plaintiff property valued at $35,758.73, including a 1992 Clayton mobile home and a savings and stock ownership plan with her employer, and awarded Debtor property valued at $20,700.00. The state court ordered Plaintiff to pay five marital debts totaling $26,077.00, and ordered Debtor to pay four marital debts in the total amount of $12,450.00. The American General Finance debt that Debtor was ordered to pay is secured by vehicles that Debtor was awarded in the property division, and Debtor testified at trial that the Capitol One Visa debt he was ordered to pay was for charges he incurred on his personal credit card. There was not much evidence concerning the Bank One debt, except Debtor's testimony that it was incurred to replace a sewer in a house which apparently was no longer owned by the parties at the time of their divorce. Based on the foregoing, this Court does not believe that the state court's order that Debtor pay the Bank One, the American General Finance and the Capitol One Visa debts and hold Plaintiff harmless thereon was intended to serve a support function. The evidence does not show that these debts were incurred for expenditures related to the support of either Plaintiff or the parties' minor daughter. Accordingly, the Court determines that these three debts are not nondischargeable under section 523(a)(5).

A more difficult determination is whether the state court's order that Debtor pay one-half of the Cambridge Credit Company debt was intended to be in the nature of support. The total amount of this debt at the time of the dissolution was $5,500.00. Plaintiff was ordered to pay one-half, and Debtor was ordered to pay one-half. Plaintiff testified that this obligation consisted of a combination

of debts, including debts owed to Dillard's and J. C. Penney for expenses incurred on behalf of the parties' minor daughter for school, clothes and other miscellaneous expenses; a debt to St. Mary's Hospital for medical expenses incurred on behalf of the parties' minor daughter, and a debt to Beneficial Finance for an expense incurred by Plaintiff, which she stated was less than the amount of $2,750.00. Plaintiff did not provide any further specifics to assist the Court in determining the amount and nature of the debt incurred on behalf of the parties' minor daughter, such as receipts or other documentation. When questioned, Debtor did not dispute Plaintiff's testimony that half of this debt was the result of expenses incurred on behalf of the parties' minor daughter. It appears that the Cambridge Credit Company debt arose from obligations incurred by the parties prior to the dissolution of their marriage. While this Court is not bound by the state court's characterization in the Decree, Plaintiff has the burden to show that the state court intended something other than a division of property and debts when it ordered Debtor to pay one-half of the debt to Cambridge Credit Company. See Waltner, 271 B.R. at 175. As mentioned above, Debtor's obligation to pay this debt was set forth in the Property and Debts section of the Decree. The state court set forth the child support obligations in the Child Support section of the Decree, which shows that the state court was capable of awarding support when it intended to do so. The state court also decreed that neither party would receive maintenance. These factors suggest that the state court intended merely a division of debt when ordering each party to pay one-half of the Cambridge Credit Company obligation. Further, this Court would be required to engage in speculation in an attempt to determine the amount of the debt that the state court intended to serve a support function, since both parties have an obligation to support the minor daughter, and the amount intended to be a division of property and debt. Based on the evidence, this Court is not convinced that Debtor's obligation to pay one-half of the Cambridge Credit Company debt was intended to serve a support function, and determines that this debt is not nondischargeable

under section 523(a)(5).

b. Section 523(a)(15)

The Court will now address whether Debtor's four hold harmless obligations to Plaintiff are nondischargeable under section 523(a)(15) of the Bankruptcy Code, which states that:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt–
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> . . . .
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> (15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless–
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> (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or
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> (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

11 U.S.C. § 523(a)(15).

In Moeder v. Moeder (In re Moeder), the BAP opined:

> Section 523(a)(15) excepts from discharge those debts arising out of marital dissolution proceedings that do not constitute nondischargeable alimony, maintenance or support under § 523(a)(5); i.e. property settlement awards. The legislative history of this provision indicates that it was added to the Bankruptcy Code to provide greater protection for nondebtor divorcing spouses who agree to take reduced alimony and support payments in exchange for an increased property settlement. H.R. REP. NO. 103-385, at 54 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3363. Thus, while a debtor's obligation to make a settlement of marital property would be dischargeable under § 523(a)(5), such an obligation is nondischargeable under § 523(a)(15), with two important exceptions: (1) subsection (A) of § 523(a)(15) provides that a property settlement award arising out of divorce proceedings is dischargeable where the debtor does not have the ability to pay the debt from disposable income; and (2) subsection (B) provides that such a property settlement award is dischargeable where discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to the nondebtor spouse.

Moeder, 220 B.R. at 54 (citations omitted). "[O]nce the objecting creditor proves that the debt

constitutes a property settlement award incurred in the course of divorce proceedings, the burden shifts to the debtor to prove either of the exceptions to nondischargeability contained in subsections (A) or (B)." Id. at 56 (citations omitted). See also Florio v. Florio (In re Florio), 187 B.R. 654, 657 (Bankr. W.D. Mo. 1995)(Once the creditor/former spouse meets her burden, the debtor bears the burden of going forward and showing either inability to pay the debt from income or property not needed for the support of his child and himself and not needed to continue, preserve or operate a business, or showing that discharging the debt would be more beneficial to him than detrimental to the creditor/former spouse.).

Here, neither party disputes that Debtor's obligation to hold Plaintiff harmless from liability on the four debts at issue arose from the dissolution proceeding. Therefore, the Court finds that Plaintiff has met her initial burden to show that the debts constitute a property settlement award incurred in connection with the parties' divorce.

Debtor testified at trial that he intends to reaffirm the debt owed to American General Finance and Capitol One Visa. Debtor stated that recently he has been making the monthly payment to American General Finance, and he has included in his Schedule J an expense in the amount of $286.00 for an automobile installment payment, which appears to be the payment to American General Finance, and an expense in the amount of $40.00 for a reaffirmed Visa card payment. Debtor's actions indicate that he believes he has the ability to pay the debts owed to American General Finance and Capitol One Visa. The Court's inquiry does not end, however, because the obligation to hold Plaintiff harmless on these two debts may still be discharged if Debtor can show that discharge is more beneficial to him than detrimental to Plaintiff. "Other courts examining this issue have held that this test requires the court to weigh several factors and apply a totality of the circumstances test. Those factors include: The income and expenses of both parties, the nature of the debt, and the former spouse's ability to pay

the debt." Florio, 187 B.R. at 658 (citations omitted). Here, Plaintiff has shown that she does not have the ability to pay these debts if Debtor fails to pay. Although on paper she appears to have a slight excess of income over expenses each month, Plaintiff did not include in her exhibit several expenses which she testified she incurs, and she must use food banks to help with her food expense. Further, the American General Finance debt is secured by property owned by Debtor in which Plaintiff has no interest. Debtor uses at least one of the vehicles that is security for the loan in his waterproofing business, in which Plaintiff has no interest and from which she does not receive income. Debtor testified that the Capitol One Visa debt consists of charges that he incurred on his personal credit card. Finally, as this Court noted in Florio v. Florio (In re Florio), "[a]t least one court has found that equity weighs against discharge where the debtor has the ability to pay a debt under § 523(a)(15)." Florio, 187 B.R. at 658 (citation omitted). "'Discharging this obligation would simply provide Debtor with additional disposable income to "use at his discretion." This is not the type of benefit that § 523(a)(15)(B) ought to protect.'" Id. (quoting Carroll v. Carroll (In re Carroll), 187 B.R. 197, 201 (Bankr. S.D. Ohio 1995)). The Court determines that Debtor has failed to show that discharging the obligation to hold Plaintiff harmless on the debts he was ordered to pay to American General Finance and Capitol One Visa is more beneficial to him than detrimental to Plaintiff. Accordingly, Debtor's hold harmless obligation to Plaintiff is nondischargeable under section 523(a)(15) to the extent that Plaintiff is required to pay any of the indebtedness owed to either American General Finance or Capitol One Visa.

Plaintiff testified at trial that she has already paid off the entire debt owed by the parties to Cambridge Credit Company, and requests a ruling that Debtor's obligation to hold her harmless from liability on his one-half of the debt is nondischargeable. Plaintiff also seeks to have Debtor's hold harmless obligation on the debt owed to Bank One held nondischargeable. The Court will first

examine whether Debtor has the ability to reimburse Plaintiff for the Cambridge Credit Company debt that she has already paid, and pay her to the extent that Plaintiff is required at some future time to pay Bank One. In Burton v. Burton (In re Burton), 242 B.R. 674, 682 (Bankr. W.D. Mo. 1999), the Honorable Jerry W. Venters opined:

> The Court's consideration of the Debtor's ability to pay, however, is not limited to a bare assessment of his current income and reasonable expenses. Courts in this jurisdiction have taken guidance from the analysis employed in § 523(a)(8) student loan discharge cases, which takes into account the "totality of the circumstances," to determine whether a debtor has the ability to pay in the context of § 523(a)(15). In re Florio, 187 B.R. at 657; Comisky v. Comisky (In re Comisky), 183 B.R. 883, 884 (Bankr. N.D. Cal. 1995). The totality of the circumstances test used in § 523(a)(8) cases includes, but is not limited to, an analysis of (1) the debtor's past, present, and reasonably reliable future financial resources, (2) calculation of the debtor's and his or her dependents' reasonable necessary living expenses, and (3) any other relevant facts and circumstances surrounding the particular bankruptcy case. See Andresen v. Nebraska Student Loan Program, Inc. (In re Andresen), 232 B.R. 127, 140 (8th Cir. BAP 1999).

Here, no evidence was presented of Debtor's past employment, except the statements made by the state court in the Decree. Currently, Debtor has stable employment and earns net income of $1,581.01 to $1,631.01 per month, which includes net income from his part-time waterproofing business and music gigs. Since the divorce, Debtor has been selling his assets to pay bills and attorney's fees. For example, he sold the 1977 Harley Davidson motorcycle, sold or traded most of his baseball card collection and pawned most of his music equipment. Further his stock portfolio consisting of investments in Internet stocks has very little value, and there was no evidence that it would have any great value in the future. There are liens on Debtor's vehicles, which are all older model pickup trucks and vans. In short, Debtor does not have any remaining assets that he can liquidate in order to pay the debts in question. Debtor's living expenses seem to be reasonable, and they have increased by $200.00 to $300.00 per month because he is contributing to the expenses of caring for a child born after the bankruptcy filing. The evidence showed that Debtor's expenses

exceed his income by approximately $344.00 to $494.00 each month. There are not any other relevant facts and circumstances that have a bearing on this issue. The Court finds that Debtor has satisfied his burden to prove that the exception to nondischargeability set forth in section 523(a)(15)(A) applies, and that Debtor does not have the ability to pay the debt to Bank One or reimburse Plaintiff for one-half of the Cambridge Credit Company debt. Accordingly, the Court determines that Debtor's obligation to Plaintiff to hold her harmless from liability on these two debts is dischargeable in bankruptcy.

2. Denial of Debtor's discharge, contempt finding and imposition of sanctions under 11 U.S.C. § 105

In her complaint, Plaintiff requested that the Court issue orders pursuant to 11 U.S.C. § 105 denying Debtor's discharge, finding him to be in contempt and imposing appropriate sanctions against him, including Plaintiff's reasonable attorney's fees, asserting that in his bankruptcy schedules Debtor undervalued his baseball card collection; undervalued his stock portfolio; undervalued a 1968 Chevrolet truck, a 1985 Dodge van and a 1985 Dodge truck; omitted a 1977 Harley Davidson motorcycle; omitted musical instruments and equipment; omitted miscellaneous hand and power tools; omitted a computer and accessories; omitted the value of his waterproofing business; omitted a blue van; materially under-reported his monthly income; listed a nonexistent debt owed to F. Randy Waltz III; listed a questionable debt owed to his father; listed a debt owed to Bank One twice; listed a questionable debt owed to Sprint twice; listed a nonexistent debt owed to Dallmeyer Properties; and listed a debt owed to Providian twice. Plaintiff also asserts that there appears to be some fraud concerning Debtor's grant of a lien in the 1994 Dodge van to his father shortly before the bankruptcy filing. At trial, Plaintiff suggested "as a friend of the Court, that the Court should carefully examine [Debtor's] petition based upon what appears to be some embellishment of his debts and minimizing

substantially his assets."

The Court does not believe that a denial of Debtor's discharge, a finding of contempt or the imposition of sanctions would be appropriate here. Debtor testified at trial concerning each of the foregoing items, and the Court is satisfied that Debtor properly listed his assets and debts. Subsequent to trial, Debtor filed an amended Schedule I, which reflects an additional net monthly income in the amount of $200.00 from his waterproofing business, and which explained that Debtor is no longer playing music gigs.[6] Although the Court was initially concerned about the fact that Debtor granted a lien in the 1994 Dodge van to his father a few days before filing his Chapter 7 petition, Debtor disclosed the transaction in his bankruptcy schedules and statement of financial affairs and it appears that the Chapter 7 Trustee has investigated the situation and feels no further action is warranted. Debtor testified, and his schedules and statement of financial affairs show, that he borrowed $2,200.00 from his father in November of 2001, and that he granted the lien in the 1994 Dodge van to his father on or about February 14, 2002. Debtor frankly testified that he wanted to protect the 1994 Dodge van from seizure by child support enforcement so that he could continue to use the vehicle for transportation to and from work. However, there was no evidence that Debtor did not actually owe his father $2,200.00 prior to granting the lien as security for the debt, or that he otherwise improperly granted the lien even though it served a dual purpose of protecting the vehicle from seizure by other

[6] The Court did not consider the amended schedules, which were filed post-trial, in making a determination under sections 523(a)(5) and (a)(15). However, the Court believes that amended Schedule I is relevant for the limited purpose of ruling whether Debtor's discharge should be denied, contempt found or sanctions imposed under section 105 for failing to report all of his income. The increase in net income in the amended Schedule I is not significant, only $200.00, and the Court believes that the omission was a mistake and not the result of fraud. The mistake was promptly corrected by Debtor's counsel filing the amended Schedule I after Debtor testified at trial that he did earn some income from his part-time waterproofing business. It appears that after the trial, Debtor decided to discontinue playing music gigs.

creditors. In sum, the Court will deny the relief requested by Plaintiff pursuant to section 105.

Conclusion

Based on the above discussion, the relief requested by Tina Marie Parker in her adversary complaint against Marcus Levi Parker is GRANTED IN PART AND DENIED IN PART. The Court ORDERS that the obligation by Marcus Levi Parker to pay child support is NONDISCHARGEABLE under 11 U.S.C. § 523(a)(5); that the obligation by Marcus Levi Parker to pay 50% of the uninsured medical expenses incurred by or on behalf of the parties' minor daughter, including attorney's fees incurred by Tina Marie Parker to collect this debt, is NONDISCHARGEABLE under 11 U.S.C. § 523(a)(5); that the obligation by Marcus Levi Parker to hold Tina Marie Parker harmless from any liability on the debts owed to American General Finance and Capitol One Visa is NONDISCHARGEABLE under 11 U.S.C. § 523(a)(15); and that the obligation by Marcus Levi Parker to hold Tina Marie Parker harmless from any liability on the debt owed to Bank One and one-half of the debt owed to Cambridge Credit Company is DISCHARGEABLE under 11 U.S.C. § 523(a)(15). The request by Tina Marie Parker that the Court issue orders under 11 U.S.C. § 105 denying Debtor's discharge, finding him to be in contempt and imposing appropriate sanctions against him, including Plaintiff's reasonable attorney's fees, is DENIED. Each party shall be responsible for paying his or her own attorney's fees incurred in this action.

The foregoing Memorandum Opinion constitutes Findings of Fact and Conclusions of Law as required by Fed. R. Bankr. P. 7052.

So ORDERED this 1st day of October, 2002.

/s/ Frank W. Koger
Bankruptcy Judge

Copy of the foregoing to:

Richard Beaver, Attorney for debtor/defendant
F. Randall Waltz, III, Attorney for plaintiff